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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 01 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner does not identify its type of business on Part 5 of the petition. It seeks to employ the beneficiary permanently in the United States as an electronic technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel asserts that the evidence submitted established the petitioner's continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is $20.18 per hour, which amounts to $41,974.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for Multi-Facet Communications since December 1996.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of $700,000 and to currently employ fifteen workers. In support of the petition, the petitioner submitted an undated letter on its letterhead, with an illegible signature, reiterating the job offer to the beneficiary at the proffered wage. The letter also claimed that the petitioner has had the ability to pay the proffered wage since

January 1998 and that it changed its name from 'Multi-Facet Communications, Inc.' to 'Techtronics' in 1998, although the management and shares held remained the same. Mult-Facet Communications, Inc., located at a different address as that given for the petitioner on the immigrant petition (I-140), is the employer that was named on the ETA 750A.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 24, 2003, the director requested additional evidence pertinent to that ability. The director requested that the petitioner provide copies of annual reports, its latest federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically instructed the petitioner to submit copies of its 1998 – 2002 tax returns, as well as copies of the beneficiary's Wage and Tax Statements (W-2s) for 1998 –2002.

The director further requested the petitioner to substantiate that it had changed its name as noted above. In response, the petitioner submitted a copy of the same letter that it had originally submitted with the petition.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 5, 2004, denied the petition. The director found that the petitioner had not submitted the necessary evidence to establish its continuing ability to pay the proffered salary and had also not corroborated that it is the same employer as Mult-Facet [redacted]

On appeal, counsel basically asserts that the evidence and documentation submitted was sufficient to establish its financial ability and that the director's decision should be reversed. Counsel states that there was no need for tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided no evidence that it has paid wages to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had

properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The AAO concurs with the director's decision. As the prospective U.S. employer, the petitioner bears the burden to demonstrate its continuing ability to pay the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denial. 8 C.F.R. 103.2(b)(14).

In the instant case, the petitioner provided no annual report, no tax returns, and no audited financial statements to demonstrate its continuing ability to pay the proffered wage as required by the regulation at 8 C.F.R. 204.5(g)(2). Counsel's assertion that ample evidence was provided is not persuasive. One letter from an unidentifiable individual is not sufficient to establish the petitioner's ability to pay the proposed wage offer or to corroborate that the I-140 petitioner is the same as the petitioner named on the labor certification. The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered the same entity or a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See, e.g., Matter of United Investment Group,* Int. Dec. 2990 (Comm. 1985). *See also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The petitioner failed to submit evidence sufficient to demonstrate that it has had the continuing ability to pay the proffered wage beginning as of the priority date or to establish that it can be considered the same employer or a successor-in-interest to the employer named on the approved ETA 750A.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.